KUALA LUMPUR CITY SECURITIES SDN BHD

v.

CHEONG CHAI HOO

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-2314-1998]
16 APRIL 2004

CIVIL PROCEDURE: *Pleadings - Amendment - Statement of defence - Principles applicable - Whether character of defence changed - Whether conduct of defendant grossly contumelious - Whether plaintiff prejudiced*

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This was an appeal by the defendant against the decision of the senior assistant registrar dismissing her application to re-amend her statement of defence in relation to a suit commenced by the plaintiff against the defendant for amounts outstanding, contra losses and commission due under a share trading account. The defendant had sought to strike out her admission of having a trading account with the plaintiff, averring that the deletion of her earlier admission was necessary because it was only after she had perused the relevant documents that she realised that the plaintiff was referring to an account that was not hers. The defendant submitted that her application was *bona fide* and did not in any way prejudice the plaintiff; further, there was no question of the proposed re-amendment having any adverse effect on the character of the suit as it only involved the aforementioned deletion.

Held (dismissing the defendant's appeal):

[1] For nearly five years (during which time the defendant went through all the pre-trial preparatory works and after reaching the gateway to a full trial twice) the defendant had been consistent that she had a trading account, albeit one she had never utilised, with the plaintiff. In light of the protracted and prolonged length of time this case had taken thus far, surely the necessity for the re-amendment would have become abundantly apparent much earlier. Altogether, this made suspect the defendant's averment that she had only just realised that the account that the plaintiff was referring to was not hers. Taking all the reasons in aggregate, the defendant's conduct in this regard was grossly contumelious. (p 896 b-e)

[1a] The total effect of the re-amendment would be to deny that the defendant had ever opened or maintained an account with the plaintiff. This would undoubtedly change the character of the defence to one of another inconsistent character. That would cause injustice to the plaintiff. The plaintiff would be prejudiced by such a re-amendment after thus long being led to believe that the defendant's only stance in this case was that she had never authorised any trading under the account. (p 896 f)

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim How Chong [1997] 1 CLJ 361 CA ***(refd)***

Abu Bakar v. Mohamed Zain [1967] 1 MLJ 168 ***(refd)***

Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [1998] 2 CLJ 11 CA ***(refd)***

Hock Hua Bank v. Leong Yew Chin [1987] 1 CLJ 126; [1987] 1 CLJ (Rep) 126 SC ***(refd)***

Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 1 CLJ 632; [1988] 1 CLJ (Rep) 606 HC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(1)

For the respondent/plaintiff - M/s Edwin Lim & Suren

For the appellant/defendant - V Sree; M/s JM Chong, Vincent Chee & Co

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

Preamble

On 29 August 2003 the learned senior assistant registrar dismissed the defendant's application to reamend her statement of defence. Enclosure 28 is the defendant's appeal against that decision.

Background Facts

I have set out the facts and chronology of events of this case as they are relevant considerations for this appeal.

The plaintiff commenced this suit against the defendant on 9 July 1998 for RM360,860.71 being amounts outstanding, contra losses and commission due under a share trading account.

Though the defendant filed her appearance timeously, she failed to file her defence within the prescribed time frame. On 9 November 1998, the defendant obtained the leave of court to file her defence out of time. The plaintiff did not object to the defendant's application for leave of court.

The defendant, in her statement of defence (encl. 5), denied the plaintiff's claim, putting the plaintiff to strict proof. Although the defendant admitted having a share trading account with the plaintiff, she denied ever trading or authorising another to trade using the account. The defendant maintained that she never received any contract notes, monthly statements or even the letter of demand from the plaintiff. She only found out about the alleged debt she owed the plaintiff in September 1997 when she decided to terminate what she thought was a dormant trading account. The defendant alleged that one Wong Lee Choo, a remisier and the plaintiff's agent, fabricated her particulars in the application form to operate a trading account with the plaintiff. She immediately lodged a police report and despite extending a copy of the same to the plaintiff, the plaintiff failed to investigate her allegations, choosing instead to pursue the claim against her.

The court then gave the necessary directions to the parties to file their documents and get the case ready for hearing. About a year and 1/2 later, the defendant filed an application to amend her defence. The plaintiff did not object to this application and the defendant obtained the leave of court to do so.

The defendant in her amended statement of defence (encl. 10) now included an allegation of negligence and a breach of a duty of care by the plaintiff. She also disputed the plaintiff's right to claim late charges and or default interest on the amounts outstanding. After the requisite case management sessions which extended from August 2001 to March 2002, the parties identified 4 issues to be determined and the court fixed this matter for full trial on 25-27 November 2002. By this time the parties had also complied with the directions to file the statements of agreed facts and facts in dispute, the Bundle of Pleadings and the Common Bundle of Documents (Parts B & C) (encls. 14 and 14).

On the first day of trial, the defendant's solicitor requested that the matter be postponed till 27 November 2002 as parties were negotiating a settlement. The parties had agreed that even if the negotiations fell through, they would try to further reduce the triable issues to only one issue and accordingly prepare their witness statements. On 27 November 2002, the court was told

that parties had agreed that the sole issue to be determined was whether the defendant had instructed the plaintiff to buy and sell shares using the trading account. The defendant was unable to secure the attendance of her witness, a remisier, and ask for the matter to be postponed to another date. The ever amiable plaintiff did not object. The next hearing dates were 7-10 April 2003.

On 7 April 2003, the defendant's solicitor referred the court to letter dated 31 March 2003 wherein they had requested for a postponement of the full trial to enable the defendant to obtain information and other related documents from the police, including a chemist report. Apparently there were several police reports against Wong Lee Choo, the remisier; including one by Teh Seng Chay (Teh), the defendant's husband. Teh had alleged that his signature was forged and in the course of their investigations, the police had requested for a chemist report. The defendant's solicitor assured the court that solicitors from both sides were trying to get the plaintiff and defendant to abide by the outcome of the chemist report to resolve this claim, without a need for a full trial. The court allowed the postponement and vacated the remaining hearing dates. The case was fixed for mention on 23 July 2003 for the parties to brief the court of the progress.

On 18 July 2003, five days before the mention of this case, the defendant filed an application to reamend her defence (encl. 27). As the application was fixed for hearing before the SAR on 26 August 2003, the case was fixed for mention on 21 October 2003 to enable the application to be heard first.

The Application To Reamend

The defendant's proposed re-amended statement of defence, annexed to the application, showed a single re-amendment; namely to strike out the underlined words in para. 2 of the said pleading. The said paragraph reads:

> 2. **Save that the defendant has a trading account ('the said account') with the plaintiff,** the defendant denies paragraph 3 of the statement of claim and states that the defendant had not utilised the said account nor had instructed the plaintiff to buy or sell shares under the said account. The plaintiff is put to strict proof thereof. (emphasis added).

The defendant was seeking to strike out her admission of having a trading account with the plaintiff. In the succinct affidavit in support of the application, the defendant averred that the deletion of her earlier admission was necessary because it was only after she had perused the documents that she realised that the account the plaintiff was referring to was not hers.

The defendant submitted that her application was *bona fide* and did not in any way prejudice the plaintiff. Further, there was no question of the proposed re-amendment having any adverse effect on the character of the suit as it only involved the deletion of her admission of having a trading account with the plaintiff.

The Law

This area of the law in relation to applications to amend is well settled. The guiding principles were established by the Federal Court in *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 *(Yamaha)*. Mohamed Azmi FJ (as he then was) delivering the judgment of the court held that:

> … Under O. 20 of the Rules of the High Court 1980, …, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must be exercised judicially … The general principle is that the Court will allow such amendments as will cause no injustice to other parties. Three basic questions should be considered to determine whether injustice would or would not result,
>
> (1) whether the application is *bona fide*;
>
> (2) whether the prejudice caused to the other side can be compensated by costs and
>
> (3) whether the amendments would not in effect turn the suit from one character into a suit of another inconsistent character.
>
> To the aforesaid three questions, I would add a fourth question: whether the conduct of the applicant was grossly contumelious. If the answers are in the affirmative, and the conduct of the applicant is not grossly contumelious, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

(See *Hock Hua Bank v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126, *Abdul Johari bin Abdul Rahman v. Lim How Chong* [1997] 1 CLJ 361 and *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [1998] 2 CLJ 11.)

The Appeal

For nearly five years, during which time the defendant went through all the pre-trial preparatory works and after reaching the gateway to a full trial twice, she was in no doubt that she had a trading account with the plaintiff. In fact till the application to reamend, she had been consistent – she had a trading account but she had never utilised the said account. This consistency is borne out in the statement of agreed facts (encl. 17) wherein the defendant had agreed to the fact that she had completed an application form to open a trading account with the plaintiff. In fact, the said application is the only document in Part B of the Common Bundle of Documents which was filed on 23 November 2001. In light of protracted and prolonged length of time this case has taken thus far, surely the necessity for the re-amendment would have become abundantly apparent much earlier. (See *Abu Bakar v. Mohamed Zain* [1967] 1 MLJ 168 and *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 1 CLJ 632; [1988] 1 CLJ (Rep) 606). Altogether, this makes suspect the defendant's averment that she had only just realised that the account the plaintiff was referring to was not hers. For all the above reasons taken in aggregate, I find the defendant's conduct in this regard to be grossly contumelious.

The total effect of the re-amendment the defendant was seeking would be to deny that the defendant had ever opened or maintained an account with the plaintiff. This would undoubtedly change the character of the defence to one of another inconsistent character. To hold otherwise would cause injustice to the plaintiff. The plaintiff would be prejudiced by such a re-amendment after thus long being led to believe that the defendant's only stance in this case was that she never authorised the trading under her account.

Conclusion

I carefully perusal the pleadings, the affidavit and the submissions put in by both sides to answer the three basic question enumerated in *Yamaha*. As my answers are in the first and second questions are in the negative and the third and fourth in the affirmative, I decided to dismiss the defendant's appeal in encl. 28 with costs.

Postscriptum

A final observation which I wish to make is that under the proposed amendments to s. 68(1) of the Courts of Judicature Act 1964 (of which I am a member of the sub-committee) this decision would become non-appealable without leave of the Court of Appeal. Time would be better spent if the defendant focused her efforts on getting up this long pending matter for trial.